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In The

Supreme Court of the United States

PUERTO RICO TELEPHONE COMPANY, INC.,

Petitioner,

v.

U.S. PHONE MANUFACTURING CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the longstanding jurisprudence of Puerto Rico, a provision in an arbitration agreement requiring that an arbitration must be "in accordance with law" is construed to reflect the parties' agreement to full judicial review of arbitral awards on questions of law. The First Circuit refused to give force and effect to this principle, holding that this Court's decision in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995), preempts a departure from the default rules set forth in Sections 10 and 11 of the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 10, 11, which strictly limit the judicial review of arbitral awards, notwithstanding the plain meaning of the contractual language under Puerto Rico law.

The question presented is whether the FAA pre-empts the rights of parties seeking to invoke state-law arbitration principles to opt out of FAA's more restrictive judicial review regime in this setting.

LIST OF PARTIES AND RULE 29.6 STATEMENT

Petitioner Puerto Rico Telephone Company ("PRTC") is a wholly owned subsidiary of Telecomunicaciones de Puerto Rico, Inc. ("TELPRI"). TELPRI is owned by Verizon Communications (52.1%), PRTA Holdings Corp. (28%), Popular Inc. (12.9%), and PRTC's employees (7%). PRTA Holdings Corp. is wholly owned by the government of the Commonwealth of Puerto Rico. In 1987, PRTC was wholly owned by the government of the Commonwealth of Puerto Rico. Respondent U.S. Phone Manufacturing Corporation ("U.S. Phone") is an independent corporate entity. No publicly held company owns 10% or more of the stock of U.S. Phone.

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PETITION FOR WRIT OF CERTIORARI

PRTC respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 427 F.3d 21. Appendix ("App.") 1.

The Opinions and Orders of the United States District Court for the District of Puerto Rico are unpublished. App. 24, 28.

The arbitration award is unpublished. App. 32.

JURISDICTION

The opinion of the First Circuit was issued on October 14, 2005. App. 1. On December 29, 2005, Justice Souter enlarged the time to petition for a writ of certiorari to and including February 10, 2006 (No. 05A579). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS

This case involves provisions of the Federal Arbitration Act, 9 U.S.C. §§ 1-16. Section 10, 9 U.S.C. § 10, states:

> (a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating

> the award upon the application of any party to the arbitration –
>
> (1) where the award was procured by corruption, fraud, or undue means;
>
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
>
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
>
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.
>
> (b) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.
>
> (c) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

Section 11 of the FAA, 9 U.S.C. § 11, states:

> In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting

the award upon the application of any party to the arbitration –

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

STATEMENT OF THE CASE

A. Introduction

This case presents a matter of great importance to the Commonwealth of Puerto Rico and its business community. It also presents a set of related issues that have confounded the lower courts for a decade or more. The current state of the law creates uncertainty over whether the intentions of contracting parties to depart from the FAA's default rules of judicial review will be honored by the courts.

The First Circuit was asked to determine the availability and scope of judicial review of an arbitral award. In answering the questions posed by this case, the court of appeals navigated between this Court's decisions in

Mastrobuono and *Volt Information Servs., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989), to uncover a chimera-like rule that serves neither the purposes of the FAA, nor the rights of those who seek to resolve their disputes by arbitration. Commentators have called for additional enlightenment in this important area of arbitration law.[1] This case is an appropriate vehicle for that review.

B. Factual Background

On July 8, 1987, PRTC requested bids for a five-year procurement contract for the purchase of memory telephones to replace older, outdated telephones for residential use. The bid proposal did not specify the number of telephones to be purchased each year, but PRTC estimated that it would purchase 25,000 telephones annually based on its current consumer demand. On February 10, 1988, PRTC awarded the bid jointly to U.S. Phone and two other companies.

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[1] *See e.g.*, Milana Koptsiovsky, "A Right to Contract for Judicial Review of an Arbitration Award: Does Freedom of Contract Apply to Arbitration Agreements," 36 CONN. L. REV. 609 (2004); Jonathan R. Bunch, "Arbitration Clauses Should be Enforced According to Their Terms – Except When They Shouldn't Be: The Ninth Circuit Limits Parties' Ability to Contract for Standards of Review of Arbitration Awards," 2004 J. DISP. RESOL. 461 (2005); Anthony J. Longo, "Agreeing To Disagree: A Balanced Solution to Whether Parties May Contract for Expanded Judicial Review Beyond the FAA," 36 J.MARSHALL L.REV. 1005 (2003); Lee Goldman, "Contractually Expanded Review of Arbitration Awards," 8 HARV. NEGOT. L.REV. 171 (2003); Note, "An Unnecessary Choice of Law: *Volt, Mastrobuono*, and Federal Arbitration Act Preemption," 115 HARV. L.REV. 2250 (2002).

In 1988, PRTC issued purchase orders for approximately 23,000 telephones from U.S. Phone. In 1989, PRTC issued purchase orders for approximately 48,000 telephones. By 1990, however, PRTC had a sufficient number of telephones in stock to fill demand for the next two years and therefore, PRTC did not order any new telephones that year. In September 1992, PRTC informed U.S. Phone and the two other suppliers that it was terminating the contract.

Dissatisfied with the cancellation, U.S. Phone sought arbitration pursuant to the terms of the parties' agreement. In the contract, the parties had agreed to resolve any dispute by arbitration if informal settlement efforts failed. The contract provided:

> CLAUSE 17 ARBITRATION
>
> 17.1 Arbitration
>
> Any difference or disputes arising out of or in connection with the execution of this Contract shall be settled by an amicable effort of both Parties. An attempt to arrive at a settlement shall be deemed to have failed as soon as one of the Parties so notifies the other Party in writing.
>
> 17.2 Arbitration Panel
>
> If an attempt at settlement has failed, the disputes shall be finally settled under the Rules of Conciliation and Arbitration of the American Arbitration Association. . . . The panel shall meet in Puerto Rico and apply the law of the Commonwealth of Puerto Rico.